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No. 94-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,

Appellants,

v.

NED R. McWHERTER, Governor of Tennessee, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

REPLY BRIEF

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ARGUMENT

In attempting to summarily dismiss the issues presented in RWTAAAC Appellants' Jurisdictional Statement as insubstantial, Appellees cite no authority and offer no analysis to support the district court's decision to give "influence districts" significant weight in a vote dilution determination where there was evidence of extreme racial polarization in voting. Appellees' Motion to dismiss or affirm has failed to address the substance of the Jurisdictional Statement, lacks serious merit and should be denied. The Court should note probable jurisdiction over the issues presented herein.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

As demonstrated in RWTAAAC's Jurisdictional Statement, this appeal presents issues of critical importance to the interpretation and enforcement of the Voting Rights Act. The three-judge district court erred in substituting so-called "influence districts" for majority-minority districts in its vote dilution calculus where it found extreme racial polarization in voting. After apparently giving substantial weight to those districts, the district court reversed its prior finding of vote dilution. By holding that the statute only protects the equal opportunity of minorities to elect "some" candidates of their choice, in combination with theoretical influence over the election of others who are admittedly not their candidates of choice, the district court impermissibly amended Section 2 of the Voting Rights Act and substantially reduced its scope.

I. Section 2 Protects the Equal Opportunity to Elect.

Appellees have failed to address directly the issue of how "influence districts" should factor into a vote dilution calculation, merely implying that they are a "potentially important factor." Motion to Dismiss or Affirm at 6. They cite no

authority and offer no analysis to support this contention. Instead, Appellees attempt to miscast RWTAAAC Appellants' equal opportunity claims to deflect attention from the serious issues in this case.

A. Appellees mischaracterize Appellants' argument by claiming that Appellants seek proportional representation or "guaranteed" seats. *Id.* To the contrary, Appellants seek only that which Section 2 protects—the equal opportunity of minorities to elect candidates of their choice.

Appellees insist that *Johnson* v. *DeGrandy*, 114 S.Ct. 2647 (1994), "is starkly inconsistent with appellants' position." Motion to Dismiss or Affirm at 7. They are wrong. *DeGrandy* held that "the ultimate right of Section 2 is equality of opportunity." 114 S.Ct. at 2658 & n.11. That is precisely Appellants' contention in this case.

Appellees reliance on *Johnson* v. *De Grandy* is misguided. The passage cited by Appellees to support factoring influence districts into a vote dilution calculation ignores the district court's findings extreme racial polarization in voting and is, therefore, taken completely out of context. This Court reaffirmed in *De Grandy* that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." 114 S.Ct. at 2661. Far from endorsing substituting influence districts for minority opportunity districts, *De Grandy* holds only that were racial bloc voting is *not* present and minorities have "no need to be a majority within a single district in order to elect candidates of their choice," there is no duty to create majority-minority districts. 114 S.Ct. at 2661.

The court below found that majority-minority districts are required in Tennessee in order for African-Americans to have the equal opportunity to elect candidates of their choice. *RWTAAAC* v. *McWherter,* 836 F. Supp. 453, 463 (W.D.

Tenn. 1993) [*RWTAAAC I*] (because of extreme racial polarization "African-American candidates cannot expect to succeed in majority-white districts"). Appellees concede, as they must, that majority-minority districts are "'sometimes' necessary under Section 2" where minorities are unable to form coalitions with voters from other racial and ethnic groups and elect candidates of their choice. Motion to Dismiss or Affirm at 8. Such are the conditions, as the district court found, which exist in Tennessee.

B. Appellees misstate the holding of the three-judge court with regard to influence districts. The court did not, as Appellees claim, hold merely that it was "proper" to consider the existence of so-called influence districts in evaluating a Section 2 claim. Motion to Dismiss or Affirm at 5. To the contrary, the court held that the existence of influence districts was dispositive and defeated Appellants' vote dilution claim. According to the lower court:

> Were there no influence districts included in the 1992 Plan, the lack of proportionality in this case combined with other factors would be sufficient to find that Section 2 had been violated. But once we include influence districts in the calculus, the lack of proportionality is not significant enough to compel a holding that the plan violates the Voting Rights Act.

App. at 30-31. The ruling of the district court that the presence of influence districts precluded a remedy for the inability of African-Americans to elect candidates of their choice was legal error under Section 2 and the decisions of this Court.

As Appellees themselves apparently concede, influence districts are not a "substitute for majority African-American districts." Motion to Dismiss or Affirm at 5 n.5. Yet, in giving "influence districts" preclusive effect in this case, and in failing to articulate any standards for their use in lieu of

majority-minority districts, that is precisely the import of the district court's decision.

C. Appellees entirely misstate Appellants' position by claiming that Appellants "appear to recognize . . . that the presence of influence districts is a proper consideration in Section 2 analysis." Motion to Dismiss or Affirm at 5. What Appellants actually said was that where majority-minority districts could not be drawn it would be proper for a court to consider the existence of districts "in which minority voters, with the help of white crossover votes, could elect candidates of their choice." J.S. at 10 n.2.[1] Appellants have never suggested that the district court "properly considered" so-called influence districts, in which African-Americans admittedly do not have the equal opportunity to elect candidates of their choice, in denying appellants' Section 2 claim.[2]

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1. As appellants have previously noted, the standard under Section 2 is one of equal opportunity "to elect representatives" of choice, 42 U.S.C. Section 1973(b), and not merely the opportunity to influence elections. J.S. 10.

2. Appellees contend that the first question presented raises issues "not actually presented by the decision below." Motion to dismiss or Affirm at 4. The argument is makeweight and should be dismissed out of hand. The district court held that even though Appellants established "all three *Gingles* preconditions," App. at 6, and despite the fact that the challenged plan did not provide African-Americans "the opportunity to elect . . . a candidate of their own race," App. at 24, Appellants were not entitled to a remedy because they were (in theory) sufficiently numerous in some districts to "influence elections." App. at 9. The correctness of this holding is directly raised in the first question presented, J.S. at i; Appellees' contention to the contrary is so frivolous as not to warrant further discussion.

II. The District Court's Influence Theory Is Erroneous and Subject to Plenary Review by this Court.

Appellees have made no real attempt to rebut arguments against the three-judge district court's influence theory. They cite no contrary social-science authority, and try to minimize the importance of erroneous testimony from a State Senator that the lower court found highly probative and described at length. App. at 22. Appellees' failure to marshall authority in support of the lower court's theory supports RWTAAAC Appellants' contention that the court's influence theory and findings are completely erroneous.

A. Appellees' attempt to characterize the lower court's ultimate conclusion as "fact-specific" and shielded by the clearly erroneous rule, Motion to Dismiss or Affirm, 6, is unavailing. Rule 52(a), F.R.Civ.P., "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on misunderstanding of the governing rule of law." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). The decision of the three-judge district court is subject to plenary review by this Court for legal error.

Moreover, the district court expressly affirmed as being "correct" all its prior factual findings in *RWTAAAC I*, 836 F. Supp. at 453, showing minority vote dilution. App. at 5. The legal error of the district court, which is subject to full review by this Court, was in holding that despite these findings the existence of so-called influence districts precluded a remedy under Section 2.

B. Appellees claim that influence districts provide Appellants "as much political influence for [African-American] voters as, and perhaps more than," districts in which African-Americans have the opportunity to elect candidates

of their choice. Motion to Dismiss or Affirm at 6. The claim, aside from being inconsistent with Section 2, has no factual support in the record.

In justifying the preclusive effect of influence districts, the district court found "most probative" the testimony of Senator Cohen concerning the Martin Luther King, Jr. birthday bill. App. at 22. But as Appellants have pointed out—and Appellees have not denied, Motion to Dismiss or Affirm at 10 n.9—Senator Cohen's testimony was factually incorrect. The existence of influence districts had no effect whatever on passage of the King bill. J.S. at 22. Appellees' influence theory, based as it is on erroneous facts, is therefore fatally flawed.

Aside from the anecdotal (and erroneous) testimony of Senator Cohen, the lower court, as Appellees noted, relied on a so-called "statistical analysis" of recent elections to support its influence districts theory. Motion to Dismiss or Affirm at 9. However, as Appellants have pointed out, J.S. at 23, the overwhelming majority of the contests (30 out of 33) did not involve minority influence districts at all, while none of the contests showed the patterns of White/African-American voting or turn out. As a consequence, it is impossible to determine what the influence of African-American voters in fact was in *any* of the elections. In truth, there is no statistical evidence in the record to support Appellees' bald assertion that influence districts provide "as much political influence for African-American voters as, and perhaps more than," districts in which African-Americans have the opportunity to elect candidates of their choice.

There is, of course, as Appellants have pointed out, (J.S. at 20-22) an abundance of social science data that indicates that the districts characterized by the lower court as influence districts are in fact *negative* influence districts. As one commentator has explained, there is a point at which adding African-

Americans to the district creates a "racial backlash" or "racial tipping point" similar to racial tipping points in other areas, such as housing. In the South,

> [a]s the Black population reaches a critical mass, White voters begin to see Black participation as a credible threat; in reaction, White voters band together and develop more conservative preferences. Given this backlash, increasing the number of liberal Black voters in election districts will make Black voters themselves become the majority.

Richard H. Pildes, "The Politics of Race," 108 *Harv. L. Rev.* 1359, 1382 (1995). In propounding its influence district theory the district court completely ignored the empirical evidence of the social sciences and instead indulged in wholly unsupported (and erroneous) assumptions about voter behavior.[3]

III. Total Population Is the Appropriate Measure of Proportionality in this Case.

Contrary to the assertion of Appellees, RWTAAAC Appellants have consistently argued that proportional representative fairness should be measured using a flexible and expansive standard. Motion to Dismiss or Affirm at 10. In voting rights

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3. Appellees chastise appellants for failing "to perform the analysis [of the elections] they say should have been performed." Motion to Dismiss or Affirm at 10 n.9. Appellees fail to note that appellants did perform statistical analysis of the relevant African-American/White contests which formed the basis for the court's conclusion that voting was extremely racially polarized. *RWTAAAC I*, 836 F. Supp. at 463. The 1994 partisan general elections analyzed by the district court took place after trial and were not part of the record.

cases, "electorate" has an expansive meaning that includes both "voters" and "population." 93-1379 J.S. at 14 & 94-1922 J.S. at 28. The three-judge court erred in concluding that it was required by Section 2 to use VAP at the exclusive measure of proportionality. *RWTAAC I*, 836 F. Supp. at 462. This argument provides an appropriate basis for plenary review by this Court.

The facts and circumstances of this case make total population the appropriate measure of proportional representative fairness of the Tennessee State Senate redistricting plan. J.S. at 27-28. An additional majority-minority district in west Tennessee would result in a total of four majority African-American districts in the 33 member state senate, or 12.1% of the total seats. African-Americans would be under-represented as measured by VAP (14.4%), but the lack of proportionality would be even greater as measured by total population (16%).

Using VAP as the exclusive basis for determining proportionality in this case serves no purpose other than to disguise or minimize the lack of representative fairness in the state's plan and is also contrary to the requirement that Section 2 "be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom* v. *Roemer*, 111 S.Ct. 2354, 2368 (1991) (quoting *Allen* v. *State Board of Elections*, 393 U.S. 544, 567 (1969)).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction in this action and set the case for argument.

Respectfully submitted,

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